United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1059

To be argued by
T. GORMAN REILLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1059

UNITED STATES OF AMERICA,
Appellee,

—v.—

PAUL VIRUET and FRANK CERELL,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Paul Viruet and Frank Cerell appeal from judgments of conviction entered on February 6, 1976 in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Richard Owen, United States District Judge, and a jury.

Superseding Indictment 75 Cr. 979, filed on October 10, 1975, charged Viruet and Cerell and two other persons —Leon Rogers and Samuel Eason—with violations of federal law relating to stolen goods. Count One charged all four defendants with conspiracy to steal, receive and possess goods from a shipment moving in interstate commerce, in violation of Title 18, United States Code, Section 371. Count Two charged Rogers and Eason with stealing goods from an interstate shipment, in violation of Title 18, United States Code, Section 659. Count

Three charged Viruet and Cerell with knowing possession of goods which had been stolen from an interstate shipment, in violation of Title 18, United States Code, Section 659.

Rogers and Eason pleaded guilty to Count One, the conspiracy count. Count Two, a substantive count, was dismissed on December 19, 1975, the date of their sentences. Both Rogers and Eason were sentenced to one and a half years in prison, consecutive to the prison terms they were then serving.

Trial as to Viruet and Cerell commenced on December 10, 1975. On December 18, 1975 the jury convicted each defendant on Counts One and Three. On February 6, 1976 the Court sentenced Viruet to concurrent terms of one year and a day, but specified that only six months was to be served in prison, the balance to be served on probation. Judge Owen sentenced Cerell to concurrent prison terms of one year and a day.

Both Viruet and Cerell are at liberty pending this appeal.

Statement of Facts

I. Summary

In the early morning of February 21, 1973 five men hijacked a truck belonging to the Modern Trucking Company at the corner of 23rd Street and Ninth Avenue in Manhattan. Leon Rogers and James Dixon, two of the hijackers, put the driver in the back seat of their car and proceeded uptown. Two others, Carlton Boyd and Sam Eason, took control of the truck and followed the fifth participant, Chester Crawford, downtown, across the East River and eventually out to the Long Island Expressway and to the home of defendant Frank Cerell.

With the assistance of co-defendant Paul Viruet the men unloaded the contents of the truck into a small wooden building attached to the back of Cerell's house.

Cereli subsequently made two separate payments for the truckload of stolen goods to Crawford who passed the monies on to Boyd for further distribution. Viruet arranged to meet with Boyd in Manhattan where he made a final payment for the truckload of stolen merchandise.

Both Cerell and Viruet testified that they were acquainted with Crawford during February 1973 but denied any knowledge of the hijacking or the receipt of the merchandise. Cerell, his wife and mother testified that they were home on the morning of February 21, 1973; that no truck arrived at the house; and that no packages and cartons were unloaded into the attached building at the rear of the house. Viruet testified that he was on his way to work when the alleged unloading took place. A custodian of payroll records verified that Viruet was at work that day.

II. The Government's Case

In December of 1972 Chester Crawford fingered Teddy Smith, the driver of truck number M711 for Modern Trucking Company, as a prime hijacking target. Crawford, himself the operator of a small fleet of trucks (Tr. 118), had become familiar with Smith's delivery schedule. (Tr. 121).* Smith made a daily run to various packing houses in New Jersey, usually leaving the Modern

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* "Tr." refers to the trial transcript; the suffix "a" refers to Cerell's Appendix on Appeal; "GX" refers to Government Exhibits; "DX" refers to Defense Exhibits.

Trucking Company terminal at 24th Street near 11th Avenue at about 6 o'clock in the morning. (Tr. 88).

During the next two months* Crawford had numerous discussions with Carlton Boyd, Sam Eason, James Dixon and Leon Rogers concerning plans to hijack the Modern truck. (Tr. 126, 221, 395-96). A principal problem was to find someone to whom they could sell the load. (Tr. 121). In this regard Crawford turned to Viruet and Cerell, whom he knew as Paul and Frankie. (Tr. 204, 209).

Crawford's negotiations with Viruet and Cerell began in December 1972 and continued through the eve of the hijacking. (Tr. 319). At first Viruet and Cerell stated that they would try to find someone to finance the load since they did not have sufficient money themselves to pay for it. When they were unable to locate a customer for Crawford, Viruet and Cerell agreed to handle the load themselves on condition that payment would be made after they had a chance to sell the merchandise. (Tr. 123-24, 319).

On the evening before the hijacking Crawford met with Boyd, Eason, Dixon and Rogers at 121st Street and Manhattan Avenue on the street outside Dixon's home. Crawford advised them that the hijacking would take place the following morning and that they should meet between 4:30 and 5:00 A.M. (Tr. 125-26, 398). Crawford had already told them that he knew "a couple of guys in Long Island" who would take the load, namely, Frankie and Paul. (Tr. 398, 444).

That evening Crawford also contacted Viruet by phone to let him know that he was going to hijack the Modern

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* Boyd's recollection was that they had first discussed the matter two weeks before the hijacking. (Tr. 442).

truck the next morning. (Tr. 125). It was the expectation of all involved that the Modern truck driven by Teddy Smith would contain men's suits. (Tr. 395, 423-24, 443).

The following morning the five men met at 120th Street and Manhattan Avenue between 4:30 and 5:00 o'clock. They then drove downtown in two cars to the area of the Modern Trucking Company terminal. (Tr. 126-27, 400-01, 444). Teddy Smith, who had loaded the truck with infant wear and foundation garments the afternoon before, came to work before 6 o'clock that morning. Shortly thereafter he was in his truck, out of the terminal and on his way to New Jersey. (Tr. 32-34). As he drove down 24th Street he caught the hijackers off guard and they were not able to stop him as planned. Smith then turned down 9th Avenue and came to a stop at a traffic light on 23rd Street. By this time the hijackers had caught up with Smith; Boyd and Eason stepped into the cab of the truck and forced Smith to move over.

Boyd then drove the truck to 22nd Street near 7th Avenue, where Smith was taken out of the truck and placed in the backseat of the car occupied by Rogers and Dixon. These two then proceeded to drive Smith around the city until about 8 A.M. when he was let out near 154th Street and 8th Avenue. Smith immediately called his employer to report the theft. (Tr. 34-37, 39, 67, 81-82, 128-29, 401-03, 433-34).

Meanwhile, Carlton Boyd, with Sam Eason in the passenger seat, drove the truck across 22nd Street, south on 2nd Avenue to Delancey Street and then across the East River over the Williamsburg Bridge. Crawford, proceeding ahead in his car, stopped on the Brooklyn side and instructed Boyd to continue out to the Long Island Expressway while he, Crawford, made a phone call. (Tr. 129-30, 234, 445).

Crawford then called Viruet at his home in Holbrook, Long Island. Viruet told Crawford that the load was going to Cerell's house and that Crawford and the truck should get off the Long Island Expressway at South Oyster Bay Road, Exit 43, where he and Cereil would arrange to meet them. (Tr. 130-31). Crawford proceeded out the Long Island Expressway, overtook Boyd and Eason, and led the truck off at Exit 43. (Tr. 131-33, 445-46). They proceeded a short distance to the intersection of South Oyster Bay Road and Old Country Road where Crawford made a phone call to Cerell.

Shortly thereafter Viruet and Cerell arrived by car, spoke briefly with Crawford and Boyd, and then led the way to Cerell's home. (Tr. 133, 446-48).

When the group arrived at Cerell's home, Boyd backed the truck along the driveway at the side of Cerell's house to an area in the rear. There they unloaded the contents of the truck into an unusual wooden "shed" which was attached to the rear of the house. This "shed" was in fact a two room building which was connected to the main part of the house by interior stairs leading down to the basement. (Tr. 135-136, 448; GX 8, 9). Crawford, Boyd and Eason, joined by Viruet and Cereli, quickly unloaded the truck, placing most of the cartons in the rooms of the shed, some other cartons down in the basement and a few more outside, behind the shed. A few of the cartons were opened for inspection. To everyone's dismay they contained girdles, lamps, children's clothes and other assorted merchandise, but no men's suits. (Tr. 134, 138, 449). No money was paid by Viruet and Cerell at this time although there was a brief discussion that they would try to make payment when some of the goods were sold. (Tr. 138, 449).

Boyd then left Cerell's house and drove the truck for about 15 to 20 minutes to a point near the Long Island

Expressway. After dusting down the truck he and Eason got in Crawford's car and returned to the city. (Tr. 138-39). The empty truck was located by the FBI two days later on Broadway just north of the Long Island Expressway in Jericho, New York. (Tr. 362).*

The following day Crawford met Cerell at 101st Street and Lefferts Boulevard in South Ozone Park where Cerell gave Crawford a partial payment for the load. According to Crawford the amount was somewhere between $600 and $1,000. (Tr. 140-41, 267). Crawford in turn gave this money to Boyd at 121st Street and Manhattan Avenue for distribution to Eason, Dixon and Rogers.** (Tr. 142).

Further payments were stretched out over the next few weeks. Viruet explained to Crawford that they were having trouble with the load because it was so bad. (Tr. 142). Cerell made a second payment of about $500-$600 which Crawford intended to keep for himself. However, in a subsequent telephone conversation with Viruet, Crawford learned that Boyd, Dixon and the others were pressing Viruet for more money.*** Crawford therefore arranged to contribute a few hundred dollars to add to the amount that Viruet was bringing

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* Shortly before the trial an FBI agent traveled the distance from Cerell's house to the location where the truck had been found. The distance was less than five miles. The time of travel was between 10 and 15 minutes. (Tr. 362-63).

** Dixon also testified that Crawford brought the money to Boyd at 120th Street and Manhattan Avenue. He fixed the amount at the slightly higher figure of $400-$600 apiece for Boyd, Eason and himself. (Tr. 404; 425-27). Boyd stated that he received about $1450 on this first payment from Crawford. His testimony varied from the others in that he recalled the money being received from Crawford in Jamaica, Queens. (Tr. 451, 484, 496).

*** Before the hijacking they had been promised $5,000 each for their participation. (Tr. 395).

to them in Manhattan. (Tr. 145). Viruet went to 125th Street near Broadway on a Saturday morning and gave Boyd about $900 to split among himself, Eason and Dixon. (Tr. 145, 405-06, 429, 451, 487, 496).*

The Government also proved through the testimony of Chester Crawford that on at least three occasions in the past Viruet had fenced merchandise of a similar character—tablecloths, cases of wine and women's dresses—for Crawford. In addition, shortly after the hijacking, Cerell fenced two stolen certified checks to Crawford, and at about the same time, Viruet and Cerell planned with Crawford to pick up a truckload of cigarettes from North Carolina through the use of stolen certified checks. The plan aborted with Crawford's arrest and incarceration in April of 1973 on an unrelated matter. (Tr. 148-55, 272-77, 296-99, 302-06, 307-10, 334).

In addition to the testimony of the co-conspirators, Crawford, Boyd and Dixon, the Government presented the following witnesses: Teddy Smith, the driver of the hijacked truck; Henry Hyman, the president of Modern Trucking Company; William Bellikoff, the president of the now defunct Tempo Foundations Company; Charles Wolf, the president of Fairy Tale Childrens Wear, Inc.; Danny Ingram, an employee of City Cooling Corp., an air conditioning repair company where Viruet was employed during February 1973;** and FBI Special Agents Martin Crowe, Allen Garber and Steven Bursey.

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* There was a slight variance in the amounts believed to have been paid. Boyd said he received $900. (Tr. 451). Dixon stated that the three of them got $500-$600 apiece but added that he couldn't remember exactly how much money was paid. (Tr. 406).

** Ingram's testimony established that Viruet had the use of a red Vega automobile which was supplied to him by City Cooling, a car which fit the description given by Boyd and by

[Footnote continued on following page]

III. The Defense Case

A. Cerell

Cerell took the stand and also called three other witnesses: Ann Cerell, his wife; Rose Cerell, his mother; and Roseann Anderson, a next-door neighbor.

Cerell admitted knowing Crawford, having been introduced to him by Viruet during the latter part of 1972. (Tr. 628-29). Cerell claimed that his relationship to Crawford was limited to providing him with assistance in lining up labor and materials for various building projects that Crawford was involved in. (Tr. 629, 641-45, 660). Although Crawford visited Cerell's house on two occasions, the visits were brief and occurred prior to February 21, 1973. (Tr. 639-43). Cerell denied any connection with or knowledge of the Modern truck hijacking. (Tr. 645-50, 654).

On cross-examination Cerell conceded that Crawford may have visited him in February and March of 1973. (Tr. 665).

Ann Cerell testified that no truck appeared at the house on February 21, 1973 and no cartons were placed in the wooden structure at the rear of the house or in the basement. She stated that this wooden structure was a small apartment, filled with furniture, which at

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Sam Eason, a witness called by the defense, as being the car which met the hijackers when they got off the Long Island Expressway and which led them to Cerell's house. Ingram also testified that during February 1973 it was the practice of City Cooling employees to go straight to the premises where they were performing winter time servicing of air conditioners; that no time cards were used; and that the man in charge on the job would call in to the main office to report that all workers were present. (Tr. 353-61).

the time was occupied by her mother-in-law. (Tr. 548-55, 557, 562). Rose Cerell testified to the same effect (Tr. 616-21), and Roscanne Anderson, the next door neighbor, testified that she couldn't recall what happened on February 21, 1973; that she didn't observe a truck backing into the Cerell's driveway that morning; but that she had no time to look out the window in any event. (Tr. 610-14).

B. Viruet

Viruet also took the stand. He admitted knowing Crawford since 1967 or 1968, but stated that his relationship with Crawford was limited to discussions of air conditioning matters, infrequent visits in each other's home, and the sale of a German Shepherd dog. (Tr. 738-44, 746). Viruet denied having any discussions with Crawford about a proposed hijacking; denied ever seeing the Modern truck pictured in GX 1 and 2; and denied being at Cerell's house on the morning of February 21, 1973. (Tr. 752-53). He testified that during the time of the hijacking he worked for the City Cooling Company and it was his custom to leave his home in Holbrook, New York for work at about 6 o'clock in the morning. The trip usually took an hour and a half. (Tr. 748-49).

Anita Launders, a former officer of the City Cooling Company, produced pay records which indicated that Viruet was at work on February 21, 1973 (Tr. 718-19; Viruet DX N), and Richard Waegerle, a neighbor and friend of many years, testified as to Viruet's honesty and integrity. (Tr. 671-72).

Viruet also called co-conspirator Sam Eason as a witness. Eason testified that he had recently pleaded guilty on the conspiracy count. After his plea he was

interviewed by the Government attorney and was shown two spreads of photographs. He said that he recognized one of the individuals in the first spread as looking like someone he knew as "Paul" who came with the pay-off from the hijacking. (Tr. 679-81). When shown the second spread Eason picked out a photograph of someone else whom he recognized as "Frankie." (Tr. 684-85). It was stipulated that the two spreads contained pictures of Viruet and Cerell and that Eason failed to select either of those pictures. (Tr. 682, 685).

On cross-examination by the Government Eason testified that he participated in the hijacking, that he rode as a passenger and that Carlton Boyd drove the truck down to the Williamsburg Bridge, across the East River and out to Long Island. Eason further stated that when they got off the expressway they saw a red Vega which they later followed to a nearby house.* This house had a small shed attached to the back where they unloaded the merchandise. They were assisted by a couple of fellows referred to as "Frankie" and "Paul". (Tr. 695-96). After the unloading Boyd drove the truck for about 15 to 20 minutes and left it parked near a service station. (Tr. 696). Sometime thereafter on a Saturday morning "Paul" came to 125th Street and Amsterdam Avenue to meet with Boyd. (Tr. 697-98).

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* Eason's testimony concerning some of the details varied from the account given by Crawford and Boyd. For example, he stated that the truck left the expressway at Exit 61, not Exit 43, and that the red Vega was on the side of the road waiting. (Tr. 693-94). Eason's confusion was probably attributable to the fact that he had been sleeping for most of the trip. (Tr. 692-93).

ARGUMENT

POINT I

The Evidence Of Similar Acts Was Properly Received On The Issue Of The Defendants' Knowing Participation In The Conspiracy.

At the conclusion of its direct examination of Chester Crawford the Government offered evidence that Viruet had acted as a fence of stolen goods from Crawford on three prior occasions; that Cerell fenced two stolen certified checks to Crawford shortly after the Modern Truck hijacking; and that both Viruet and Cerell negotiated with Crawford concerning a truck load of cigarettes at about the same time. (Tr. 148-55). Before Government counsel was able to elicit this testimony, an objection was timely made and a ruling permitting the introduction of the evidence was obtained from the Court.* At the conclusion of the case, the Court gave a limiting charge which precluded the jury from considering the similar act testimony except as to the issue of the defendants' knowing participation in the conspiracy.** No

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* As Viruet concedes in his brief (Viruet Br. at 10), prior notice that the Government intended to offer similar act testimony was given. No application was made to the Court for disclosure of the details of the similar acts which the Government intended to prove. (Tr. 146-48).

** The relevant portion of the Court's charge reads as follows:

"If you do conclude that the conspiracy as charged did exist, you must then determine whether Mr. Cerell and Mr. Viruet here became members of it. The defendant's participation in a conspiracy, if you find that one existed, must be established by the independent evidence of his own acts, conduct, and statements, as well as those of other alleged co-conspirators, and the reasonable inferences to be drawn from them. In this connection, evidence was received as to other occasions not charged in the indictment,

[Footnote continued on following page]

objection was taken to this aspect of the charge and no other charge was proffered by the defendants. (63a-65a).

Viruet challenges the admission of the similar acts on five grounds: the other crimes were not directly linked to the crime charged in the indictment; the evidence was used solely to prove criminal character and was therefore prejudicial; the evidence was unnecessary; the Court erred in allowing the evidence without first obtaining a detailed statement as to the Government's proof; and testimony as to the negotiations for a truckload of cigarettes should have been excluded because the transaction never materialized. Cerell makes but two points: first, the other crimes were not substantially relevant to the crime charged in the indictment; and second, the incident involving the certified checks was improperly admitted because it was not a prior, but a subsequent act. None of the defendants' contentions has merit.

In a spate of decisions this Court has emphasized that it now adheres to an inclusory rule with respect to

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when Chester Crawford allegedly had dealings with each of the defendants regarding other stolen items: wine, checks, for example.

This evidence, if credited by you, is to be considered only on the question of whether a defendant was engaged in a course of conduct with Crawford, to deal in stolen items; and only to the extent that it bears, if you so find, on the fact of a defendant's connection with this particular highjacking. Neither defendant is on trial for any charge other than those contained in this indictment, and for fencing the stolen items referred to in this indictment.

To find either defendant a member of this conspiracy, you must upon all the evidence be satisfied beyond a reasonable doubt that the defendant was aware of its unlawful purpose; that he was a willing participant with intent to advance its purposes, and that he joined the conspiracy with a specific criminal intent; that is, with a deliberate purpose to violate the law." (43a-44a).

similar act evidence. *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3358 (Dec. 15, 1975); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Such evidence is admissible "for all purposes except to show defendant's criminal character or disposition." *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir. 1976). See also *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975); *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Brettholz*, 485 F.2d 483, 487-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); Rule 404(b), Federal Rules of Evidence. In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potentially prejudicial effect. *United States* v. *Leonard*, 524 F.2d 1076, 1080 (2d Cir. 1975); *United States* v. *Papadakis*, *supra*; *United States* v. *Deaton*, *supra*. This balancing is addressed to the sound discretion of the trial judge whose determination is entitled to great weight and will rarely be reversed on appeal. *United States* v. *Leonard*, *supra*, 524 F.2d at 1092; *United States* v. *Brettholz*, *supra*, 485 F.2d at 487-88.

The evidence of these other acts was clearly relevant to the crimes charged in the indictment. The two defendants were charged as fences of stolen goods and knowing participants in a conspiracy to hijack a truck and to later possess the hijacked goods knowing they were stolen. It was their position at trial as demonstrated by protracted cross-examination of the Modern truck driver, the first witness in the case, that they were not present when the truck was hijacked and thus could not be deemed to be participants in the conspiracy to steal the merchandise or for that matter be charged with knowledge of the stolen character of the goods.

(Tr. 39-40, 84). Indeed, in his brief Viruet stresses with respect to the conspiracy count that the Government must prove that the two defendants "had knowledge of and agreed to dispose of [the goods from the Modern Truck] when they would have been hijacked." (Viruet Br. at 20). Cerell likewise states his theory of defense to be that he was acquainted with Crawford but that this relationship did not encompass an agreement "to fence the load taken from the hijacked truck." (Cerell Br. at 3).

The similar act evidence which the Government offered established that the agreement to hijack the Modern truck and fence the load was part of a continuing pattern of behavior, which Crawford had already engaged in with Viruet and which he was in the process of engaging in with Cerell. This history of a prior relationship corroborated Crawford's testimony that he had discussed the hijacking of the truck with the defendants prior to February 21, 1973 and tended to show that the defendants had knowledge of the means by which the goods were to be obtained.

There is no merit to defendants' claim that the receipt of similar act evidence is limited to acts which are directly related to the crime at issue. In *United States* v. *Papadakis*, *supra*, for example, the Court approved the receipt of evidence relating to five separate incidents which took place before, during and after the period of the conspiracy charged in the indictment. Only one of these incidents was directly related to the crime for which the defendants were being charged. Yet the receipt of all the similar act evidence was approved because it showed the existence of a broader conspiracy of which the conspiracy charged was only a part. *Id.* at 295:

> "The charge of conspiracy to commit criminal acts always requires proof of a course of con-

duct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern before their eyes." *Id.* at 294-95.

As to the defendants' claim of prejudice the aforegoing discussion makes clear that the similar act testimony was not offered *solely* to prove criminal character. The probative value of such testimony "is dependent on the existence of a close parallel between the crime charged and the acts shown." *United States* v. *Leonard*, *supra*, 524 F.2d at 1091, *citing* 2 Wigmore, Evidence § 302, at 200-01 (3rd ed. 1948). Crawford's prior transactions with Viruet—the fencing of stolen tablecloths, the fencing of hijacked cases of wine, the fencing of hijacked dresses—were clearly parallel, if not identical. The subsequent fencing of stolen checks from Cerell to Crawford fell into the same pattern, the only difference being that no truck was involved and the roles of the players changed. So too, the projected use of stolen checks to pay for a truckload of cigarettes from North Carolina continued the pattern. The use of this testimony was not prejudicial to the defendants in the relevant sense; for if it worked to their prejudice, "it did so because the evidence was damning, not because its introduction was error." *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973). It was not the equivalent of a "bloody shirt," *United States* v. *Leonard*, *supra*, 524 F.2d at 1091, nor can it be said to have been inflammatory such as to be likely to arouse the irrational passions of the jury. *United States* v. *Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971).

Viruet's argument that the similar act testimony was unnecessary is not persuasive. He cites *United States* v. *Byrd*, 352 F.2d 570, 575 (2d Cir. 1965), presumably for the proposition that evidence of knowledge and intent should be offered in rebuttal rather than on the Govern-

ment's main case. The force of that *dictum* in *Byrd* seems to have been weakened by subsequent decisions of this Court. The settled rule now is that evidence of a similar act is admissible on the Government's direct case where knowledge or intent is at issue, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States* v. *DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970);* *United States* v. *Brettholz*, *supra*, at 487-88; *United States* v. *Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971). Here, as in *United States* v. *Zochowski*, 331 F. Supp. 1070, 1072 n.5 (S.D.N.Y. 1971) (Weinfeld, J.), *aff'd*, 456 F.2d 1336 (2d Cir. 1972),

> "defendant's objection that the evidence should not have been received in the government's direct case is without substance. The issue of knowledge was the hard core of the case . . . moreover, knowledge is at issue as an essential element of the government's case." [citations]

Needless to say, knowledge and intent are essential elements in any prosecution for conspiracy and possession of stolen goods. Here, by the time the similar act testimony was elicited, the Government had established that Crawford had hijacked the Modern Truck, unloaded its contents at Cerell's house in the presence of Viruet

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* In *De Cicco*, the Court found that proof of the similar act was irrelevant and had been improperly admitted since the crime charged did not require proof of any specific intent and the defendants had made clear from the outset of the trial that they had never committed the acts charged. Accordingly, the defendants' intent was not deemed to be at issue. The Court also appeared influenced by the fact that an FBI agent several times volunteered similar act testimony which the Court felt to be self-serving and designed to prejudice the defendants. *United States* v. *De Cicco*, *supra*, at 482 n.5.

and Cerell and left the empty truck within a 15 minute drive of the house. It was reasonable for the Government to believe (1) that the defense might later rest without either of the defendants taking the stand, or (2) that the defendants might take the stand and claim that they helped unload the truck at Cerell's house as an accommodation to a friend who was himself in the trucking business. In either event, defense counsel would have been free to argue that the Government had failed on its direct case to establish that their clients were knowing participants in a conspiracy or that they had reason to believe that the truck contained stolen goods. In this regard, it is significant that neither defendant made an opening statement to outline what his position would be during the trial. (Tr. 27). The fact that both defendants eventually took the stand and denied any knowledge of the truckload of goods is not sufficient cause for reversal. At the time the Government had no guarantee, let alone a hint, that this would be the defendants' testimony.* Moreover, even where a defendant flatly denies the events charged ever took place, similar acts, if relevant, may be admitted on the issue of specific intent, especially where the issue may be a close one. *United States* v. *Bradwell*, 388 F.2d 619, 621-22 (2d Cir. 1968).**

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* In response to a demand under Rule 12.1(a) of the Federal Rules of Criminal Procedure, Cerell stated that he would not offer an alibi defense; Viruet indicated that he would contend that at the time of the unloading of the truck he was on his way to work. (20a).

** Although the Assistant United States Attorney stated that the similar act evidence was not being offered on the issue of intent his reliance on language in the *Papadakis* case made it clear that its admission was being sought to establish a knowing participation in the conspiracy by the defendants. (Tr. 146-47). In any event the jury was instructed to consider the similar act testimony only for that limited purpose.

Viruet's remaining points can be briefly answered. His claim that the District Court was not in a position to weigh the probative value and prejudicial effect of the similar acts is devoid of merit. It is clear from the record that when defendants' initial objection was interposed Crawford was about to describe prior instances where Viruet had fenced stolen merchandise for him. (Tr. 146). So too with Cerell. (Tr. 153). Although much of the colloquy after the initial objection appears to be off the record (Tr. 148), the nature of the Government's proposed testimony was clear to all. If Viruet felt that a more detailed account of Crawford's testimony was necessary before the Court could make a proper ruling, he should have made an appropriate application to compel the Government to set forth the particulars of its proof. He failed to do so. In any event once the evidence was received, defense counsel could easily have made a motion to strike. Certainly, the Court was in a position to have the evidence stricken on its own motion.

Viruet's contention that the cigarette truck—stolen check discussions should have been excluded because no transaction ever occurred is without merit. His reliance on dictum in *United States* v. *Adams*, 385 F.2d 548, 551 (2d Cir. 1967) is misplaced. There the Court did not hold that similar act testimony about negotiations which did not result in completed transactions should have been excluded. Rather, the Court pointed out that such similar act testimony related to the defendants' state of mind and that "proof of this might better be deferred until the defense case makes it necessary to develop evidence of other crimes for that purpose." *Id. citing United States* v. *Byrd*, *supra*. In view of the more recent decisions discussed at pages 17-18 of our brief, this mild admonition is insufficient support for the proposition that such evidence should be excluded altogether.

Finally, Cerell's argument that subsequent similar acts as opposed to prior acts may not be used flies in the face of settled law. *See United States* v. *Leonard*, *supra*; *United States* v. *Papadakis*, *supra*; *United States* v. *Warren*, 453 F.2d 738, 745 (2d Cir. 1972), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

POINT II

The Court In Its Supplemental Charge Properly Instructed The Jury That Even As To The Conspiracy Count There Was No Requirement To Prove That The Defendants Knew The Truck To Have Been Moving In Interstate Commerce.

In its charge at the end of the case, the Court directed the jury's attention to a supposed difference between the conspiracy count and the substantive count insofar as the element of interstate commerce was concerned.* In es-

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* The relevant portion of the Court's charge reads as follows:

"In addition, with respect to the conspiracy count, the government must establish an additional element of intent. You will recall that I said, in reference to the substantive or the possession count, that it was not necessary for the government to prove that the defendant knew the goods had been moving in interstate commerce. If you found that the goods, in fact, were traveling interstate, that finding was sufficient for the federal substantive violation.

However, for the conspiracy count, for there to be a violation of the law under the conspiracy count, the government must establish that a defendant knew that the goods he was conspiring to steal or to fence, were to be those that were moving in interstate commerce. In this connection, the government contended that there is proof that Crawford, one of the alleged co-conspirators, had selected Teddy's truck as the one to be highjacked sometime before, and knowing that Crawford knew that this truck regularly went through New York depot to distribution centers in New Jersey. If you find this as a fact, then you may find that this element has been satisfied." (47a-48a).

sence the Court instructed the jury that in order to convict on the conspiracy count it must find that the defendants knew that the hijacked truck was moving in interstate commerce. Understandably, no objection was taken by the defense. Government counsel, being then unaware of the Supreme Court's decision in *United States* v. *Feola*, 420 U.S. 671 (1975), which overruled the venerable authority of *United States* v. *Crimmins*, 123 F.2d 271 (2d Cir. 1941), likewise saw no reason to object. After five hours of deliberation the jury sent out a note requesting the judge to summarize the law relating to the interstate aspect of conspiracy. (71a, 83a; Court Ex. 4). This prompted some quick research by the Government attorney who was rewarded by discovery of the *Feola case*. The Court was then requested to and did modify its previous charge in accordance with the now controlling law.* A verdict was returned shortly thereafter.

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* The Court's supplemental charge reads as follows:

"Now, ladies and gentlemen, you have asked me in Question 2, my charge regarding the interstate aspect of conspiracy, if I can sum it up in a nutshell. It has been called to my attention, since I charged you this morning, that I may have been in error in details of that charge and to the extent that I have, I am giving you now what I understand the law to be in that regard, and this is the law that you are to apply. If there are any problems in your understanding of it, please listen very carefully to what I am about to say to you.

With regard to the interstate aspect of this conspiracy, it is sufficient—I assume you have found all the other elements beyond a reasonable doubt, but if you have found all the other elements beyond a reasonable doubt, it is sufficient to satisfy the interstate commerce aspect of this conspiracy if you find beyond a reasonable doubt that the truck the conspirators had in mind to highjack was, in fact, one that would be moving in interstate commerce.

It is not necessary that you find that a defendant or either of them knew that the truck to be highjacked would

[Footnote continued on following page]

Neither defendant claims any error merely because the jury received two different charges on this one issue.* Rather, it is their contention that *United States* v. *Feola*, *supra*, which was directly concerned with a conspiracy to assault a federal official under Title 18, United States Code, Section 111, is inapplicable to a charge of conspiracy to steal goods from a truck moving in interstate commerce under Title 18, United States Code, Section 659. However, Justice Blackmun's extended and careful analysis of the *Crimmins* case makes it impossible to conclude that the Court's decision in *Feola* was meant to be so narrow, and the concluding words of the Court's opinion certainly dispel any lingering doubts:

> "To summarize, with the exception of the infrequent situation in which reference to the knowledge of the parties to an illegal agreement is necessary to establish the existence of federal jurisdiction, we hold that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense." 420 U.S. at 696.

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be moving in interstate commerce. It is sufficient for you to find that the truck to be highjacked was, in fact, one that would be going in interstate commerce, regardless of what the defendants' knowledge about the destination of that truck was." (83a-84a).

* Viruet, in all of whose arguments Cerell joins, concedes, as he must, that a supplemental charge may be used to correct an error (Viruet Br. at 28), since "[i]t is axiomatic that an original omission or error in a charge later taken up and explained or corrected cures the defect or oversight." *United States* v. *Wilson*, 214 F. Supp. 629, 630 (D. Del. 1963). Here, the defendants can claim no prejudice due to the jury's initial deliberations under a mistaken charge, since it was laboring under the impression all that time that the Government had a heavier burden than the law in fact required. See *Baker* v. *United States*, 156 F.2d 386, 390-91 (5th Cir. 1946).

Nor can the defendants argue that it remains an open issue whether this Court will follow *Feola* where a conspiracy to violate Section 659 of Title 18 is charged. The precise issue has already been decided in *United States* v. *Green*, 523 F.2d 229, 233-34 (2d Cir. 1975):

> "Appellants also argue that the evidence was insufficient to sustain a conviction for conspiracy because there was no evidence of an intent to steal from foreign commerce. We disagree. A substantive violation of 18 U.S.C. § 659 does not require knowledge of the interstate or foreign character of the goods. *United States* v. *Houle*, 490 F.2d 167, 170 (2d Cir. 1973), *cert. denied*, 417 U.S. 970, 94 S. Ct. 3174, 41 L.Ed.2d 1141 (1974); *United States* v. *Tyers*, 487 F.2d 828, 830 (2d Cir. 1973), *cert. denied*, 416 U.S. 971, 94 S. Ct. 1995, 40 L.Ed.2d 560 (1974). It is therefore unnecessary to prove such knowledge in order to establish a conspiracy violation. *United States* v. *Feola*, — U.S. —, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); *United States* v. *Podell*, 519 F.2d 144 (2d Cir. 1975)."

There is therefore no basis for contending that the Court's supplemental charge on the conspiracy charge was in error.*

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* Cerell's argument on this point (Cerell Br., Point III, pp. 22-23) is at best unclear. He concedes that the evidence need not establish that the defendants knew that the goods were part of an interstate shipment. His argument is instead that once the truck had been taken by the hijackers the interstate journey and the goods had come to a rest. Considering that the Government need not show that the journey had even started, *United States* v. *Astolas*, 487 F.2d 275 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974), the thrust of Cerell's argument is difficult to follow either with respect to the conspiracy count or the substantive count.

POINT III

The Proof Was Sufficient To Sustain A Conviction On The Conspiracy Count.

Both Viruet and Cerell contend that the proof was insufficient to convict them on the conspiracy count. Their arguments are bottomed on the claim that at most the Government's proof demonstrated that Viruet and Cerell had conspired to hijack a truckload of men's suits, whereas in fact Crawford and his crew came up with girdles and infant wear. Viruet argues, citing *United States* v. *Gallishaw*, 428 F.2d 750 (2d Cir. 1970), that there was no proof that he had knowledge of the girdles-infant wear conspiracy. Cerell relies on *Kotteakos* v. *United States*, 328 U.S. 750 (1946) and related cases to argue that there were multiple conspiracies proven and that the Government failed to show that he had agreed to that conspiracy involving the goods which were ultimately delivered. Both arguments are frivolous.

If the jury credited the testimony of Crawford, as we are entitled to assume it did on this appeal, *e.g.*, *United States* v. *Koos*, 506 F.2d 1103 (2d Cir. 1974), *cert. denied*, 420 U.S. 977 and 421 U.S. 911 (1975), then it must have found that Viruet and Cerell were fully advised of the plans to hijack the Modern truck as it left the terminal early in the morning of February 21, 1973. Viruet and Cerell were integral parts of the conspiracy to hijack the Modern truck, because it was they who agreed in advance to take the load immediately thereafter. Their later disappointment that the truck had not been loaded up with men's suits, as they had expected, but contained undergarments and assorted merchandise of less value did not render them non-members of a conspiracy to steal an interstate shipment of freight. The essence of their agreement was to hijack the Modern truck and to fence its contents.

The driver of a get away car will not be heard to argue that his participation in a conspiracy to rob a bank did not exist simply because the hold-up men came out of the bank with less money than they had been counting on or, indeed, with no money at all. *Cf. Williamson* v. *United States*, 207 U.S. 425, 447 (1908). Viruet and Cerell likewise have no basis to contend that the conspiracy to which they subscribed was of a totally different character. For, the end result does not determine the object of the conspiracy. Even if the conspiracy had completely failed of its purpose, *e.g.*, by the immediate arrest of Crawford and the others at the scene of the hijacking, a conspiracy conviction of these defendants would be warranted. See *United States* v. *Rabinowitz*, 238 U.S. 78, 86 (1915); *United States* v. *Torres*, 503 F.2d 1120, 1124 n.2 (2d Cir. 1974); *United States* v. *Cioffi*, 487 F.2d 492, (2d Cir. 1973), *cert. denied sub nom. Ciuzio* v. *United States*, 416 U.S. 995 (1974); *United States* v. *Rosner*, 485 F.2d 1213, 1229 (2d Cir. 1973), *cert. denied* 417 U.S. 950 (1974); *United States* v. *Abel*, 258 F.2d 485, 489 (2d Cir. 1958), *aff'd*, 362 U.S. 217 (1960). A conspiracy conviction only requires a finding of "mission attempted", not "mission accomplished." *United States* v. *Root*, 366 F.2d 377, 383 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967); *cf. United States* v. *Heng Awkak Roman*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). What is significant here is that all members of the conspiracy had knowledge that a specific truck was to be hijacked.

The cases relied on by defendants are not in point. *United States* v. *Gallishaw*, *supra*, is a case where the jury was allowed to find that a defendant who had supplied a machine gun knew that "something wrong" would be done with it and therefore was guilty of a conspiracy to rob a bank. At a minimum the Government had to prove that the defendant knew that a bank was to be

robbed. *Id.* at 763. In the instant case, the Government overwhelmingly established that Viruet and Cerell knew a truck was to be hijacked. The defendants' reliance on *Kotteakos* and *United States* v. *Papa*, slip op. 2977 (2d Cir. April 2, 1976) is similarly misplaced. In *Kotteakos* the Court found a fatal variance between the indictment which charged one conspiracy and the Government's proof which revealed eight different conspiracies, the only nexus among them being that one man participated in all. *United States* v. *Kotteakos*, *supra*, 328 U.S. at 773-74. In *Papa*, this Court rejected double jeopardy claim since the two indictments involved charged factually different conspiracies with different co-conspirators and different overt acts. *United States* v. *Papa*, *supra*, at 2985. The Court found that Papa was "the director of two unrelated chains distributing narcotics; the mere fact that he supervised each chain does not transform two separte conspiracies into one." *Id.* at 2990. Here only one conspiracy was charged; only one conspiracy was shown to have existed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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